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In the Supreme Court of the United States

OCTOBER TERM, 1984

UNITED STATES OF AMERICA, PETITIONER

v.

HUGHES ANDERSON BAGLEY

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTION PRESENTED

Whether respondent's convictions should be set aside because the government failed to disclose, in response to respondent's pretrial request, evidence that respondent might have used to impeach two government witnesses, when it has been established beyond a reasonable doubt that the evidence would not have affected the verdict.

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UNITED STATES OF AMERICA, PETITIONER

v.

HUGHES ANDERSON BAGLEY

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The Solicitor General, on behalf of the United States, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra,* 1a-6a) is reported at 719 F.2d 1462. The order of the district court (App., *infra,* 7a-9a) and the proposed findings and recommendations of the magistrate (App., *infra,* 10a-15a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on November 10, 1983 (App., *infra,* 17a). A petition for rehearing was denied on March 2, 1984 (App., *infra,* 16a). On May 22, 1984, Justice Rehnquist extended the time in which to file a petition for a writ of certiorari to July 10, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Respondent was indicted in the United States District Court for the Western District of Washington on 15 charges of violating federal narcotics and firearms statutes.[1] In December 1977, after a trial without a jury, he was convicted on 11 counts of narcotics violations and acquitted on the other charges.[2] O'Connor and Mitchell, two private security guards who were also commissioned as state law enforcement officers, had aided the Bureau of Alcohol, Tobacco and Firearms (ATF) in its investigation of respondent and testified for the government at respondent's trial. Pet. App. 2a.

Before the trial, respondent sought discovery of, among other things, "any deals, promises or inducements made" to witnesses the government intended to call "in exchange for their testimony" (E.R. 9). Among the material respondent

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[1]Count I of the indictment charged that respondent was an accessory after the fact to various firearms offenses, in violation of 18 U.S.C. 3. Counts II and III charged that respondent distributed a controlled substance, and Counts VI-XIV charged that he possessed a controlled substance with intent to distribute it, in violation of 21 U.S.C. 841(a)(1) and 841(b)(1)(B). Count IV charged him with dealing in firearms and ammunition without being licensed to do so, in violation of 18 U.S.C. 922(a)(1) and 924(a). Counts V and XV charged him with possessing unregistered firearms, in violation of 26 U.S.C. 5861(d) and 5871. E.R. 1-7. ("E.R." refers to the Excerpt of Record filed in the court of appeals.)

[2]Respondent was found not guilty on Counts I, IV, V, and XV. He was convicted on Counts II and III. On Counts VI-XIV, he was found guilty "of the lesser-included crime of possessing the described controlled substances" (E.R. 31). On Count II he was sentenced to six months' imprisonment and a special parole term of five years. On Count III he was sentenced to a suspended term of three years' imprisonment and placed on probation for five years. On Counts VI through XIV his sentence was suspended and he was placed on probation for five years. E.R. 32. Respondent's probation was subsequently revoked when he was convicted of another offense, and he was sentenced to three years' imprisonment. App., *infra*, 10a; E.R. 119.

received in response to his discovery motions were affidavits by O'Connor and Mitchell. These affidavits, which were apparently furnished by the government in order to comply with respondent's request (E.R. 9) for "all Jencks Act material" (see 18 U.S.C. 3500), had been prepared during the investigation of respondent. They recounted at some length the dealings that O'Connor and Mitchell had with respondent on various occasions. See E.R. 64-85. Each affidavit contained the following recital: "I made this statement freely and voluntarily without any threats or rewards, or promises of reward having been made to me in return for it." E.R. 65, 66, 70, 72, 74, 77, 79, 82, 84.[3]

2. In 1980, respondent filed a motion to vacate his sentence under 28 U.S.C. 2255.[4] He alleged that the government had failed to disclose material that he could have used to impeach O'Connor and Mitchell. Respondent's motion was assigned to the same district judge who had presided over his non-jury trial and rendered the verdict.

After a hearing before a magistrate, the district court found (see App., *infra*, 7a) that in May 1977, O'Connor and

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[3]The court of appeals characterized these recitals as statements by O'Connor and Mitchell that each "had neither received nor expected compensation for his services" (App., *infra*, 2a). This description is exaggerated and inaccurate. The recitals, both literally and in context, represent only that the witnesses were not paid for giving their statements, not that they expected no compensation for the activities described in the statements.

[4]Respondent originally filed a petition for a writ of habeas corpus (see 28 U.S.C. 2241) in the Central District of California, where he was confined. This document was deemed a motion for relief under Section 2255 and transferred to the Western District of Washington. See E.R. 120. Apparently because respondent first sought a writ of habeas corpus, the warden having custody of respondent was named as the appellee in the court of appeals. The United States is the proper party adverse to the movant in a Section 2255 proceeding, and we have substituted the United States as petitioner in this Court.

Mitchell had each signed a blank form contract printed by the ATF. This form was entitled "Contract for Purchase of Information and Payment of Lump Sum Therefor" (*id.* at 12a).[5] The district court found that these forms "reflected no description of services, no dollar amount, and no signatures on behalf of ATF. The Contracts were not signed on behalf of ATF until after the trial" (*ibid.*). O'Connor testified at the hearing on respondent's motion that he "signed many ATF forms during the course of the investigation" (*ibid.*), and the district court found that "neither O'Connor nor Mitchell remembers signing [the contracts]. * * * There is no evidence that either O'Connor or Mitchell read the Contract or retained a copy" (*ibid.*).

The district court further found that no representative of the government "ever promised future payment for their testimony, either to O'Connor or to Mitchell, except for nominal witness fees" (App., *infra,* 11a). The court also noted, however, that the ATF agent with whom O'Connor and Mitchell were dealing "might have told them, at the time they signed the Contracts, that he would attempt to secure some expense money for them" (*id.* at 12a). After the trial, this ATF agent initiated efforts to obtain compensation for O'Connor and Mitchell, and each received $300 (*id.* at 13a, 14a). On this basis, the district court concluded that "it appears probable * * * that O'Connor and Mitchell did expect to receive from the United States some kind of compensation, over and above their expenses, for their assistance, though perhaps not for their testimony" (*id.* at 7a).[6]

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[5]Respondent sought collateral relief after he had discovered these contracts by invoking the Freedom of Information Act and the Privacy Act, 5 U.S.C. 552 and 552a (App., *infra,* 2a).

[6]O'Connor and Mitchell also were paid a small amount of expense money — $90 and $80 respectively — before trial. The district court found that these payments "were intended to reimburse them" (App., *infra,* 14a) for "various expenses, including but not limited to automobile use and meals in the course of the investigation" (*id.* at 13a).

The form contracts were not disclosed to respondent before trial. The government attorney responsible for prosecuting respondent stated, in stipulated testimony, that he had not known of the unexecuted contracts and that he would have furnished them to respondent if he had known of them (App., *infra,* 13a).

3. The district court denied respondent's motion. It remarked that "[a]s the trier of fact in [respondent's] trial * * * this Court is in the unique position of being able to know what effect the disclosure of the ATF agreements with O'Connor and Mitchell could have had upon the decisions made by the Court in the criminal prosecution" (App., *infra,* 8a). The district court then ruled "beyond reasonable doubt that had the existence of the agreements been disclosed to it during trial that disclosure would have had no effect at all upon its finding that the government had proved beyond a reasonable doubt that defendant was guilty of the offenses" of which he was convicted (*ibid.*).

The district court explained the basis for its ruling as follows (App., *infra,* 8a):

> The Court has read in their entirety the transcripts of the testimony of James P. O'Connor and Donald E. Mitchell at the trial * * *. Almost all of the testimony of both of those witnesses was devoted to the firearm charges in the indictment. The court found the defendant not guilty of those charges. With respect to the charges against defendant of distributing controlled substances and possessing controlled substances with the intention of distributing them, the testimony of O'Connor and Mitchell was relatively very brief. With respect to the charges relating to controlled substances cross-examination of those witnesses by defendant's counsel did not seek to discredit their testimony as to the facts of distribution but rather sought to show that

the controlled substances in question came from supplies which had been prescribed for defendant's own use. As to that aspect of their testimony, the testimony of O'Connor and Mitchell tended to be favorable to the defendant.

4. The court of appeals reversed (App., *infra,* 1a-6a). It stated (*id.* at 5a-6a): "[W]e hold that the government's failure to provide [the] requested * * * information to [respondent] so that he could effectively cross-examine two important government witnesses requires an automatic reversal."

The court of appeals stated that respondent "was unaware during trial that O'Connor and Mitchell were subject to impeachment for bias based on their remunerative relationship with the government. The government's failure to disclose this * * * information inhibited [respondent's] ability effectively to cross-examine two important prosecution witnesses." App., *infra,* 4a. The court of appeals did not take issue with the district court's explanation of why such a disclosure would not have affected the verdict. Instead, the court of appeals emphasized the importance of cross-examination (*id.* at 4a-5a) and based its "automatic reversal" rule on its assertion that "a failure [by the government] to disclose requested * * * information that the defendant could use to conduct an effective cross-examination is [particularly] egregious because it threatens the defendant's right to confront adverse witnesses, and therefore, his right to a fair trial" (*id.* at 5a).

REASONS FOR GRANTING THE PETITION

The court of appeals has ruled that a conviction must automatically be set aside if the government failed to disclose requested information that might have been useful in impeaching a government witness, even if it is clear beyond a reasonable doubt that the information would have had no

effect on the outcome of the trial. This approach is flatly inconsistent with the decisions of this Court, which have repeatedly emphasized — even in connection with government failures to disclose that were far more improper than anything alleged here — that a conviction is not to be set aside unless there is a significant likelihood that the evidence in question would have affected the verdict. Indeed, in discussing evidence of the kind involved here — "evidence affecting [the] credibility" of a government witness — this Court has explicitly said: "We do not * * * automatically require a new trial whenever 'a combing of the prosecutors' files after the trial has disclosed evidence possibly useful to the defense but not likely to have changed the verdict . . . .' A finding of materiality of the evidence is required." *Giglio* v. *United States,* 405 U.S. 150, 154 (1972) (citation omitted).

The court of appeals' approach would require defendants to be retried, often years after they were first convicted, for the sole purpose of permitting the use of evidence that —beyond a reasonable doubt — would not have affected the outcome of the first trial. In this way, the court of appeals' approach not only would impose wholly unnecessary costs on courts and the government but would enable some defendants — those who cannot be retried because the passage of time has adversely affected the government's case — to escape the consequences of a conviction that was the product of a wholly reliable verdict. Because the court of appeals' decision is manifestly in error and threatens to impose significant practical burdens on the administration of criminal justice, further review is warranted.

1. The court of appeals' "automatic reversal" rule appears simply to ignore the teachings of this Court's decisions. In a criminal prosecution, the government has a duty, under certain circumstances, to disclose information in its possession that could be useful to the defense. *United States*

v. *Agurs*, 427 U.S. 97 (1976); *Brady* v. *Maryland*, 373 U.S. 83 (1963). But the Court has repeatedly ruled that a violation of that duty does not "automatically" require that the defendant's conviction be set aside; the defendant is entitled to relief only if there is a sufficient likelihood that the evidence in question would have affected the verdict.[7]

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[7]It is far from clear that the prosecution breached any duty of disclosure or acted improperly at all in this case. Indeed, the district court appears to have avoided squarely ruling on whether the government should have disclosed additional information; it apparently preferred to rest its holding on the conclusion that respondent was not prejudiced even if the prosecution did err.

Respondent requested information concerning "any deals, promises or inducements made in exchange for the[] testimony" of O'Connor and Mitchell (App., *infra*, 13a; E.R. 9). The district court found that O'Connor and Mitchell were never promised payment by the government for their testimony (App., *infra*, 7a, 11a), and the court of appeals did not set aside this finding. The form contracts were not filled out and were not signed by ATF until after the trial. Thus, at the time of respondent's discovery motion, the contracts did not show that the witnesses had been promised any money at all — much less compensation (as opposed to expense money) for their testimony (as opposed to their other services).

The district court found only that it was "probable" that O'Connor and Mitchell "did expect to receive * * * some kind of compensation" (App., *infra*, 7a). Such a purely subjective expectation, of course, did not have to be "disclosed" in response to respondent's pretrial request. Moreover, the district court stated that O'Connor and Mitchell expected compensation "for their assistance, though perhaps *not* for their testimony" (*ibid.*; emphasis added). Respondent's pretrial request referred only to compensation for testimony.

The district court attached no significance to the fact that O'Connor and Mitchell received a small amount of expense money before trial (see page 4 note 6, *supra*). It is unclear whether the court of appeals believed that the government should have disclosed this information. In any event, the reimbursement of expenses was plainly not within respondent's discovery request.

Finally, as we noted above (page 3 note 3, *supra*), to the extent the court of appeals' opinion suggests that O'Connor and Mitchell made affirmatively misleading statements about the payments they had received and expected to receive, the court of appeals was incorrect.

For example, the Court has made it clear that even if the government knowingly uses perjured testimony in its efforts to convict a defendant — a vastly more egregious impropriety than anything alleged here (see *Agurs*, 427 U.S. at 104; *Mooney* v. *Holohan*, 294 U.S. 103, 112 (1935)) — the conviction should be set aside only "if there is a[] reasonable likelihood that the false testimony could have affected the judgment of the jury." *Agurs*, 427 U.S. at 103 (footnote omitted). See *Giglio* v. *United States*, 405 U.S. 150, 154 (1972), quoting *Napue* v. *Illinois*, 360 U.S. 264, 271 (1959). On numerous other occasions, the Court has considered the claims of criminal defendants who seek to have their convictions set aside because the government failed to disclose, or otherwise suppressed, evidence that might have been helpful to the defense; the Court has repeatedly emphasized in these cases that a conviction will not be overturned when the evidence allegedly suppressed by the government was not material to the defense. See, *e.g.*, *United States* v. *Valenzuela-Bernal*, 458 U.S. 858, 866-872 (1982); *California* v. *Trombetta*, No. 83-305 (June 11, 1984), slip op. 9 & n.8; *Agurs*, 427 U.S. at 104-106, 108-113; *Goldberg* v. *United States*, 425 U.S. 94, 111 (1976); *Moore* v. *Illinois*, 408 U.S. 786, 795-798 (1972); *United States* v. *Augenblick*, 393 U.S. 348, 356 (1969); *Giles* v. *Maryland*, 386 U.S. 66, 98 (1967) (Fortas, J., concurring); *Brady* v. *Maryland*, *supra*.

In this case, the government's demonstration that the evidence in question was not material met the most exacting standard; the district court found beyond a reasonable doubt that it would not have affected the outcome of the trial. The district judge who made this finding had himself been the trier of fact at respondent's trial, and he gave a cogent explanation of why his verdict would not have been affected. The court of appeals did not question this explanation or assert that the disclosure of the evidence in issue might have altered the verdict; it simply ordered a new trial,

six years after respondent's initial conviction, for the sole purpose of receiving evidence that — beyond a reasonable doubt — would not have affected the outcome of the first trial.[8]

The principal basis of the court of appeals' decision appears to have been its view that evidence that can be used to impeach a prosecution witness has a peculiar importance to the defendant. On its face, the premise that evidence useful only in impeaching a prosecution witness is more helpful to the defendant than directly exculpatory evidence is surely incorrect. And as we have noted, this Court has ruled several times that the government's failure to comply with a duty to disclose either directly exculpatory material or impeaching material does not "automatically" require the setting aside of a conviction.

The court of appeals relied heavily on *Davis* v. *Alaska*, 415 U.S. 308 (1974). But *Davis* is not a departure from the principle that the government's failure to disclose evidence cannot warrant a new trial if there is no significant likelihood that the evidence would have affected the outcome of the trial. In *Davis*, the Court reversed a conviction because

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[8]The court of appeals did not suggest that its disposition was needed to punish flagrant or repeated misconduct by the government. Even if the court of appeals had found such misconduct, it is at least open to serious question whether the court could have set aside respondent's conviction without applying a harmless error principle. See *United States* v. *Hasting*, No. 81-1463 (May 23, 1983). But in this case, it is, as we have noted, far from clear that the government acted improperly at all, and there is no suggestion of repeated or flagrant abuses (see page 8 note 7, *supra*).

Indeed, the very insignificance of the evidence suggests that the government would have seen little to be gained from deliberately withholding it. Moreover, the district court appears to have credited the prosecutor's testimony that he would have disclosed the form contracts to respondent had ATF informed him of them (see App., *infra*, 7a, 13a).

the defendant was prohibited from using in his cross-examination of Green, a crucial witness against him, the fact that Green was on probation as a juvenile delinquent. The Court in *Davis* summarized the significance of this evidence (*id.* at 311):

> [Defense] counsel made it clear that he would not introduce Green's juvenile adjudication as a general impeachment of Green's character as a truthful person, but, rather, to show specifically that at the same time Green was assisting the police in identifying [the defendant] he was on probation for burglary. From this [the defendant] would seek to show — or at least argue — that Green acted out of fear or concern of possible jeopardy to his probation. Not only might Green have made a hasty and faulty identification of [the defendant] to shift suspicion away from himself * * *, but Green might have been subject to undue pressure from the police and made his identifications under fear of possible probation revocation.

Elsewhere in the opinion in *Davis*, the Court described the evidence in a way that shows that the Court found the prohibition on its use highly damaging to the defense. See *id.* at 313-314, 318; *id.* at 319 ("Serious danger to the strength of the State's case would have been a real possibility had petitioner been allowed to pursue this line of inquiry."). It is entirely clear, therefore, that the Court's decision to set aside the defendant's conviction in *Davis* rested on its conclusion that the evidence the defense was barred from using would have been highly material and might well have affected the outcome of the trial.[9]

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[9]Not surprisingly, the court of appeals' decision here is in direct conflict with the decisions of other circuits. See, *e.g.*, *United States* v. *Farid*, No. 83-2261 (8th Cir. May 10, 1984), slip op. 4-5; *United States* v. *Sperling*, 726 F.2d 69, 72-73 (2d Cir. 1984); *United States* v. *Truong*

2. The court of appeals' approach, if it prevails, would impose substantial — and wholly unnecessary — burdens on the courts, the government, and law enforcement interests generally. Criminal defendants routinely make pretrial requests for information similar to that made by respondent. Government attorneys are of course made aware of their obligation to comply with appropriate requests; indeed, it will seldom be in the prosecutor's interest not to comply with such a request, because the disclosure of the information in the government's file will usually be far less threatening to the prosecution than the possibility that the conviction will be set aside, at some point in the future, if a mandatory disclosure is not made.

It is inevitable, however, that in a certain percentage of criminal prosecutions, government attorneys will erroneously fail to disclose information that should have been disclosed. This can occur for a number of reasons: there can be an inadvertent breakdown in communications, as apparently happened here and as can occur when different law enforcement agencies or different jurisdictions cooperate in an investigation; or an oversight can be caused by the time pressures associated with litigation and the limits on the government's resources. In addition, defendants' discovery requests are often not phrased with great precision, and a

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Dinh Hung, 667 F.2d 1105, 1107 (4th Cir. 1981), cert. denied, 454 U.S. 1144 (1982); *Zeigler* v. *Callahan*, 659 F.2d 254, 266-267 (1st Cir. 1981); *United States ex rel. Marzeno* v. *Gengler*, 574 F.2d 730 (3d Cir. 1978); *Calley* v. *Callaway*, 519 F.2d 184, 222 (5th Cir. 1975), cert. denied, 425 U.S. 911 (1976) ("[W]hen *Brady* is invoked to obtain information not favorable on the issue of guilt or innocence but useful for attacking the credibility of a prosecution witness, the information withheld must have a definite impact on the credibility of an important prosecution witness in order for nondisclosure to require reversal."). We know of no other court of appeals that has held that the government's failure to disclose requested information that could have been used to impeach a government witness requires that the conviction automatically be set aside.

prosecutor might, in good faith, interpret a request more narrowly than it is subsequently interpreted by a court entertaining a collateral challenge to the conviction. This case appears to illustrate these points as well (see page 8 note 7, *supra*).

If the government determines, during or after trial, that it may have breached a duty of disclosure, it will notify the defendant. See, *e.g.*, *United States* v. *Sperling*, 726 F.2d 69, 71 (2d Cir. 1984). In addition, prisoners are generally familiar with their rights under the Freedom of Information Act and the Privacy Act. Consequently, there is a reasonable possibility that erroneous failures to disclose information will ultimately come to the defendant's attention.

It can therefore be anticipated that the court of appeals' "automatic reversal" rule, if it prevails, will be applied in a substantial number of cases. Where the government's failure to disclose requested information has had the effect of depriving the defendant of a fair trial, he is of course entitled to have his conviction set aside. But under the court of appeals' approach, a conviction will be set aside even if it is clear that the evidence in question would not have affected the verdict. This approach serves no legitimate purpose; the costs it imposes on the courts and prosecutors that must retry the case are wholly unnecessary.

In addition, the court of appeals' approach will often, as here, require retrials many years after the events in question have occurred. Consequently, the court of appeals' "automatic reversal" rule is likely to enable some defendants who have been convicted after a fair trial at which all material evidence was available to escape retrial, or to obtain an unwarranted acquittal, because evidence has been lost, memories have faded, and witnesses cannot be found.

CONCLUSION

The petition for writ of certiorari should be granted. The Court may wish to consider summary reversal.

Respectfully submitted.

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JULY 1984

DOJ-1984-06

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 82-3303
CR No. 77-330V

HUGHES ANDERSON BAGLEY,
PETITIONER-APPELLANT,

v.

WALTER T. LUMPKIN, WARDEN,
RESPONDENT-APPELLEE.

Appeal from the United States District Court
For the Western District of Washington
Donald S. Voorhees, District Judge, Presiding

Argued and Submitted Feb. 7, 1983
[Decided Nov. 10, 1983]

OPINION

Before: SKOPIL, PREGERSON, and FERGUSON, *Circuit Judges*

PREGERSON, *Circuit Judge:*

Appellant Bagley, now on parole, appeals from the district court's order denying his 28 U.S.C. § 2255 (1976) motion to vacate, set aside, or correct his sentence. He contends (1) that the government's willful nondisclosure of impeachment evidence requested before trial denied him effective cross-examination of two key government witnesses, and (2) that the government's failure to disclose the requested information resulted in an uninformed and therefore unconstitutional jury waiver. We need address only the first of these contentions because Bagley failed to raise the jury

waiver argument below. *See United States* v. *Egger*, 509 F.2d 745, 749 (9th Cir. 1975). We reverse.

FACTS

Bagley was charged in a fifteen-count indictment with firearms and narcotics violations. On November 18, 1977, twenty-four days before trial, Bagley filed discovery motions requesting the prosecutor to disclose various items of information, including whether the government paid or promised compensation to any of its witnesses or informants. The government responded by providing affidavits from its key witnesses, James F. O'Connor and Donald E. Mitchell, each of whom stated that he had neither received nor expected compensation for his services.

O'Connor and Mitchell were commissioned Washington State law enforcement officers working as deputies for the Milwaukee Railroad during the Bureau of Alcohol, Tobacco, and Firearms (ATF) investigation of Bagley. Unknown to either Bagley or the district court judge during the bench trial, O'Connor and Mitchell had been informed by ATF Agent Prins that the ATF would attempt to pay them "expense money" in exchange for their investigatory services. In fact, O'Connor and Mitchell had each signed an ATF contract entitled "Contract for Purchase of Information and Lump Sum Therefor."

At trial, O'Connor and Mitchell testified about both the firearms and the narcotics charges. On December 23, 1977, the court found Bagley guilty on 11 counts of narcotics violations. He was found not guilty on the firearms charges.

In mid-1980, under the Freedom of Information and Privacy Acts, 5 U.S.C. §§ 552 & 552a (1982), Bagley discovered that O'Connor and Mitchell had in fact received money from the government both before and after the December 1977 trial. Bagley then filed the instant § 2255 motion and contended that the prose-

cutor's failure to produce information material to the credibility of key government witnesses violated his due process rights.

After an evidentiary hearing, the district court denied the motion. The court found, however, that O'Connor and Mitchell probably "did expect to receive from the United States some kind of compensation, over and above their expenses for their assistance, though perhaps not for their testimony." The court nonetheless found "beyond a reasonable doubt that disclosure of the ATF agreements would not have affected the outcome of the criminal prosecution."

DISCUSSION

The government acknowledges that upon specific request it has a duty to disclose evidence favorable to the accused. This is the basic principle of *Brady* v. *Maryland*, 373 U.S. 83 (1963). In *Brady*, the defendant asked the prosecution before trial to disclose a codefendant's extrajudicial statements relevant to their first-degree murder charges. Although the prosecution disclosed several statements, it withheld one in which the codefendant confessed to the actual killing. The Court ruled that "suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment irrespective of the good faith or the bad faith of the prosecution." *Id.* at 87.

In *United States* v. *Hibler*, 463 F.2d 455, 459 (9th Cir. 1972), this court underscored the government's "duty of candor" toward a criminal defendant. The prosecutor in *Hibler* had failed to disclose evidence from an independent, unbiased witness tending to support the defendant's version of the facts. In reversing the conviction, we stated:

> The test is whether the disclosed evidence was so important that its absence prevented the accused from receiving his constitutionally-guaranteed fair

> trial. That defense counsel did not specifically request the information, that a "diligent" defense attorney might have discovered the information on his own with sufficient research, or that the prosecution did not suppress the evidence in bad faith, are not conclusive; *due process can be denied by failure to disclose alone*. [Citations.]

Id. at 459 (emphasis added).

We articulated the test for determining whether the government's nondisclosure of *Brady* information requires reversal in *United States* v. *Goldberg*, 582 F.2d 483 (9th Cir. 1978). There we held that,

> [s]ince under the due process clause prosecutorial failure to respond to a specific request "is seldom, if ever, excusable," [*United States* v. *Agurs*, 427 U.S. 97, 106 (1976)], such a nondisclosure is properly analyzed as error; and it therefore follows that the reviewing judge should apply the harmless error standard, *see id.* at 111-12, 96 S. Ct. 2392; Fed. R. Crim. P. 52(a); *Chapman* v. *California*, 386 U.S. 18, 24, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967). As stated in *Schneble* v. *Florida*, 405 U.S. 427, 432, 92 S. Ct. 1056, 31 L. Ed. 2d 340 (1972), the *Chapman* standard of "harmless beyond a reasonable doubt" requires a new trial whenever there is a "reasonable possibility" that the error materially affected the verdict.

Id. at 488-89 (footnote omitted).

In the case before us, Bagley was unaware during trial that O'Connor and Mitchell were subject to impeachment for bias based on their remunerative relationship with the government. The government's failure to disclose this *Brady* information inhibited Bagley's ability effectively to cross-examine two important prosecution witnesses.

In *Davis* v. *Alaska*, 415 U.S. 308 (1974), the Supreme Court held that the denial of the "right of *effective* cross-examination" was "'constitutional error of

the first magnitude'" requiring automatic reversal. *Id.* at 319 (emphasis added) (quoting *Brookhart* v. *Janis*, 384 U.S. 1, 3 (1965)); *see also United States* v. *Uramoto*, 638 F.2d 84, 87 (9th Cir. 1980) (harmless error doctrine "inapplicable" where case involved "[d]eprivation of the right to a full and robust cross-examination of a paid Government informant").[1] In fact, effective cross-examination is so important in our legal system that Professor Wigmore described it as "beyond any doubt the greatest legal engine ever invented for the discovery of truth." 5 J. Wigmore, *Evidence in Trials at Common Law* § 1367, at 32 (Chadbourn rev. ed. 1974).

Here, the district judge, who presided over the bench trial, concluded beyond a reasonable doubt that disclosure of the ATF agreement would not have affected Bagley's conviction. We disagree. Standing alone, the government's failure to produce requested *Brady* information is a serious due process violation. *Hibler*, 463 F.2d at 459. In fact, this failure is "seldom, if ever, excusable." *United States* v. *Agurs*, 427 U.S. 97, 106 (1976). But a failure to disclose requested *Brady* information that the defendant could use to conduct an effective cross-examination is even more egregious because it threatens the defendant's right to confront adverse witnesses, and therefore, his right to a fair trial. *See Davis*, 415 U.S. at 316-19.

For these reasons, we hold that the government's failure to provide requested *Brady* information to

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[1] Although the prosecution has advanced no valid reason for nondisclosure, it contends that its failure to respect Bagley's due process rights does not require reversal because O'Connor's and Mitchell's testimony was actually exculpatory on the narcotics charges, and Bagley would not have sought to impeach "his own witness."

The government's argument rests on a false premise. After reading the record, we conclude that O'Connor's and Mitchell's testimony was in fact inculpatory on these charges.

Bagley so that he could effectively cross-examine two important government witnesses requires an automatic reversal.

REVERSED and REMANDED.

APPENDIX B

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

No. C80-1044V
(CR77-330V)

HUGHES ANDERSON BAGLEY, JR., PETITIONER,

v.

WALTER R. LUMPKIN, RESPONDENT.

ORDER

Having considered the petitioner's challenge to his conviction in Cause No. CR77-330V, pursuant to 28 U.S.C. § 2255, together with the transcript of the evidentiary hearing before Magistrate John L. Weinberg on January 18, 1982, the Proposed Findings and Recommendations for Disposition of Magistrate John L. Weinberg and the transcripts of the testimony of James P. O'Connor and Donald E. Mitchell at the trial of petitioner before this Court in Cause No. CR77-330V, the Court now finds and rules as follows:

1. The Court adopts as its own the proposed findings 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13 and 14 of Magistrate John L. Weinberg. The Court cannot adopt proposed finding No. 15 as it appears probable to the Court that O'Connor and Mitchell did expect to receive from the United States some kind of compensation, over and above their expenses, for their assistance, though perhaps not for their testimony.

2. The Court adopts as its own proposed conclusion No. 16 of Magistrate Weinberg but finds that it cannot adopt proposed Conclusion No. 17.

3. The Court has read in their entirety the transcripts of the testimony of James P. O'Connor and Donald E. Mitchell at the trial of Cause No. CR77-330V. Almost all of the testimony of both of those witnesses was devoted to the firearm charges in the indictment. The Court found the defendant not guilty of those charges. With respect to the charges against defendant of distributing controlled substances and possessing controlled substances with the intention of distributing them, the testimony of O'Connor and Mitchell was relatively very brief. With respect to the charges relating to controlled substances cross-examination of those witnesses by defendant's counsel did not seek to discredit their testimony as to the facts of distribution but rather sought to show that the controlled substances in question came from supplies which had been prescribed for defendant's own use. As to that aspect of their testimony, the testimony of O'Connor and Mitchell tended to be favorable to the defendant.

4. As the trier of fact in the trial of the defendant in Cause No. CR77-330V this Court is in the unique position of being able to know what effect the disclosure of the ATF agreements with O'Connor and Mitchell would have had upon the decisions made by the Court in the criminal prosecution.

5. The Court finds beyond reasonable doubt that had the existence of the agreements been disclosed to it during trial that disclosure would have had no effect at all upon its finding that the government had proved beyond a reasonable doubt that defendant was guilty of the offenses charged in Counts II, III and VI through XIV. The Court need not determine what effect that disclosure might have had with reference to the offenses charged in Counts I, IV and V because as to those counts the Court found that the government had not proven beyond a reasonable doubt that defendant was guilty of the offenses charged in those counts.

6. The Court finds beyond a reasonable doubt that disclosure of the ATF agreements would not have affected the outcome of the criminal prosecution.

Accordingly, the petitioner's motion must be and is DENIED.

The Clerk of this Court is instructed to send uncertified copies of this order to defendant at his place of confinement and to all counsel of record.

DATED this 12 day of May, 1982.

/s/ Donald S. Voorhees
DONALD S. VOORHEES
United States District Judge

APPENDIX C

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

Case No. C80-1044V

HUGHES ANDERSON BAGLEY, JR.,
PETITIONER

v.

WALTER R. LUMPKIN,
RESPONDENT.

PROPOSED FINDINGS AND RECOMMENDATIONS FOR DISPOSITION

PRELIMINARY MATTERS

1. Hughes Anderson Bagley Jr. ("Petitioner") was convicted and sentenced in Case No. CR77-330V for distribution and possession of controlled substances. Portions of the sentence involved periods of probation. Eighteen months later, petitioner was convicted of new offenses in a separate case (CR79-108WTM), and the court revoked his probation in CR77-330V. The "Stipulation of Procedural History" filed in this case sets forth in full the proceedings in this court relating to petitioner through the end of 1981, and is incorporated by this reference.

2. Petitioner now challenges, pursuant to 28 U.S.C. § 2255, his original conviction in Case No. CR77-330V. In summary, he alleges that the United States failed to disclose to his counsel, despite proper discovery requests, that federal law enforcement officers had: (a) made payments prior to trial to two informants, whose testimony was crucial in petitioner's conviction; and (b)

promised those informants, prior to trial, that additional payments would be made at a later time.

3. Pursuant to this court's order, the parties participated in an evidentiary hearing January 18, 1982. These Proposed Findings and Recommendations for Disposition are based upon the testimony presented and exhibits admitted at that hearing, the stipulations on file, the arguments and memoranda of the parties, and the balance of the record.

CRIMINAL INVESTIGATION

4. Donald Mitchell and James O'Connor were, in April of 1977, employed as security officers with the Milwaukee Road. They were also state-commissioned police officers. They agreed to assist agents of the Bureau of Alcohol, Tobacco and Firearms ("ATF"), U.S. Department of the Treasury, in an investigation and possible prosecution of petitioner.

5. Pursuant to that agreement, beginning in April of 1977, O'Connor and Mitchell met on several occasions with petitioner, in at least four different locations. They negotiated for and purchased from petitioner firearms and controlled substances. They also participated in meetings with ATF Case Agent Norman Prins, and other ATF agents. In doing so, O'Connor and Mitchell incurred various expenses, including but not limited to expenses associated with the use of their personal vehicles and for meals.

EXPECTATIONS OF COMPENSATION, AND "THE CONTRACTS"

6. O'Connor and Mitchell dealt primarily with Agent Prins concerning all aspects of the investigation. Neither Prins nor any other representative of ATF or the United States ever promised future payment for their testimony, either to O'Connor or to Mitchell, except for nominal witness fees. This conclusion is based upon the consistent testimony to this effect by O'Connor,

Mitchell and Prins. O'Connor and Mitchell each testified that they were never promised, and did not expect to receive, any money in exchange for their testimony. Prins testified he told each of them that they could not expect any compensation. There was no testimony to the contrary.

7. O'Connor and Mitchell each signed, on or about May 3, 1977, a form entitled "Contract for Purchase of Information and Payment of Lump Sum Therefor," ATF form 164-A ("the Contracts"). These forms were admitted as exhibits 1 and 2 at the hearing of January 18, 1982. Exhibits A-8 and A-13, which were not admitted, but to which witnesses referred in their testimony, are identical copies of exhibits 1 and 2 respectively.

8. When O'Connor and Mitchell signed the Contracts, they were printed forms on which none of the blanks had been completed, with the possible exception of the "Unique Identifier" number. The form reflected no description of services, no dollar amount, and no signatures on behalf of ATF. The Contracts were not signed on behalf of ATF until after the trial.

9. The printed language on the Contract provided that the individual signing it would provide information to ATF; and that, "... upon the accomplishment of the objective sought to be obtained by the use of such information," the United States will pay, "... a sum commensurate with services and information rendered;...." (exhibits 1 and 2).

10. While they acknowledge that their signatures are on the Contracts, neither O'Connor nor Mitchell remembers signing them. O'Connor testified he signed many ATF forms during the course of the investigation. There is no evidence that either O'Connor or Mitchell read the Contract or retained a copy. Agent Prins might have told them, at the time they signed the Contracts, that he would attempt to secure some expense money for them. But there is no other evidence

of any other promise or discussion or explanation of the Contracts.

PAYMENTS TO WITNESSES

11. O'Connor and Mitchell received payments from ATF through Prins, as follows:

Date Paid	O'Connor Received	Mitchell Received
4/28/77	$ 50	$ 40
5/3/77	20	20
5/12/77	20	20
1/4/78	300	300

In addition, each received reimbursement for funds paid to petitioner to purchase controlled substances and firearms.

12. The payments in April and May were intended to reimburse O'Connor and Mitchell for various expenses, including but not limited to automobile use and meals in the course of the investigation. O'Connor and Mitchell did not itemize their expenses. Prins arrived at the amount of the payments by his estimate of their expenses, as limited by available funds. All three believed the payments to be inadequate to reimburse O'Connor and Mitchell for their expenses.

13. Petitioner's trial took place in December of 1977. Prior to trial, defense counsel John Lundin formally requested the United States Attorney to furnish information as to "... any deals, promises or inducements made in exchange for their testimony." (Stipulation Regarding Testimony of John Lundin). He did not receive copies of the Contracts. AUSA F. J. Diskin would testify that, had he known of the Contracts in the form as they now appear, he would have provided them prior to trial. Lundin did receive Jencks material which included statements by O'Connor and Mitchell. Those statements included recitals that neither O'Connor nor

Mitchell had been promised any reward for making their statements.

14. Following petitioner's trial, Prins initiated the paperwork to provide additional, larger payments to O'Connor and Mitchell. He recommended $500 for each, and the Group Supervisor/Resident Agent concurred; but the Special Agent in Charge reduced the amount to $300 each (exhibits 3 and 4). These amounts are paid on January 4, 1978 (exhibits 5 and 6). Although in his testimony Prins characterized these payments as additional compensation for expenses, this is not borne out by the record. There is no documentation for expenses in these amounts. Mitchell testified this payment, unlike the earlier ones, was not for expenses. The paperwork by which Prins obtained authorization for the payments treats them as rewards, not reimbursement for expenses.

15. Neither O'Connor nor Mitchell expected to receive the payment of $300 or any payment from the United States for their testimony.

CONCLUSIONS

16. Payments to O'Connor and Mitchell prior to trial could not have furnished any basis for impeaching their trial testimony. These payments were relatively small in amount, and were intended to reimburse them for their expenses. Both witnesses, as well as Agent Prins, testified that the payments were inadequate to cover those expenses.

17. Because neither witness was promised or expected payment for his testimony, the United States did not withhold, during pretrial discovery, information as to any "deals, promises or inducements" to these witnesses. Nor did the United States suppress evidence favorable to the defendant, in violation of *Brady* v. *Maryland*, 373 U.S. 83 (1963).

18. Petitioner's motion is therefore not supported by the evidence, and should be denied.

DATED this 22 day of February 1982.

/s/ John L. Weinberg
JOHN L. WEINBERG
United States Magistrate

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 82-3303

HUGHES ANDERSON BAGLEY,
PETITIONER-APPELLANT,

v.

WALTER T. LUMPKIN, WARDEN.
RESPONDENT-APPELLEE.

[Filed Mar. 2, 1984]

ORDER

Before: SKOPIL, PREGERSON, and FERGUSON, *Circuit Judges*.

The panel has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the en banc suggestion and no judge of the court has requested a vote on it.

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 82-3303
DC CV 80-1044 DSV

HUGHES ANDERSON BAGLEY,
PETITIONER-APPELLANT,

v.

WALTER T. LUMPKIN, WARDEN,
RESPONDENT-APPELLEE.

JUDGMENT

APPEAL from the United States District Court for the Western District of Washington (Seattle)

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the Western District of Washington (Seattle) and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this Cause be, and hereby is reversed and remanded.

Filed and Entered NOVEMBER 10, 1983